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PROGRAM The Diane Rehm Show STATION WAMU-FM

DATE April 10, 1985 10:05 P.M. CITY Washington, D.C.

SUBJECT Leaking Classified Information

DIANE REHM: A few weeks ago, the CIA proposed prison terms for government employees who leaked classified information. Their proposal, a so-called legislative trial balloon, has been dropped. But the Administration has made no secret of its support for tighter controls on classified information leaks. The Justice Department believes such disclosures already violate criminal laws, and they've moved to prosecute an employee who sent sensitive military photographs to a magazine.

A George Carver is a former CIA official who believes we do need better controls on our classified documents. He's now with Georgetown Center for Strategic and International Studies.

J Stuart Taylor is a legislative correspondent for the New York Times. He's been covering the proposed Secrecy Act.

Mr. Carver, do we really need a Secrets Act?

GEORGE CARVER: Well, we don't need an Official Secrets Act, I don't think, because I doubt if one closely modeled along the British 1911 act, modified in 1920, would pass constitutional muster here in the United States. But I do think that we need some ratchet-tightening and the government needs a more effective arsenal of legal devices and weapons, if you will, to protect legitimate secrets than it now has in Section 793 and 794 of Title 18, U.S. Code, the so-called espionage statute; and Section 798, the so-called comment (?) statute.

REHM: Have there actually been incidents where the security of the United States was placed in jeopardy because of such leaks?

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CARVER: Well, again, it's hard to discuss jeopardy in detail deriving from a leak without compounding the damage thus done. But there has been -- you can get, for example, for the price of a subscription, or even a single copy of Aviation Week, information about the details of U.S. military activities and capabilities that it would require millions of dollars and years to acquire if you tried to collect similar information on our potential adversaries.

And we also have a very serious problem, that I was discussing with Mr. Taylor before we went on the air, that people, individuals overseas in liaison services overseas are very skittish about sharing their information or cooperating with the the United States, since they believe that we can't even protect our own secrets; therefore we're unlikely to be able to protect theirs.

REHM: Mr. Taylor, how do you see it?

STEWART TAYLOR: I think there's probably no disagreement that the government has some sensitive military/diplomatic intelligence secrets that need to be protected: the names of undercover intelligence agents, for example. And I think most journalists go to considerable pains to try to avoid, inadvertently or deliberately, publishing that kind of information.

I think the disagreement comes over where you draw the line between what is a legitimate military or intelligence secret and what is the public's business, what kind's of information raise policy issues that perhaps should be publicly debated. I think in this country we have a tradition of an open society, and the presumption has traditionally been that things should be the public's business unless a strong showing has been made that they should be secret.

Although I wouldn't rule out the possibility that some new legislation or regulations could be drawn up that would increase the government's ability to protect legitimate secrets without unduly restricting the openness of our society, I do think that those proposals that have been made so far...

REHM: Such as the CIA.

TAYLOR: Such as the CIA proposal -- are quite broad and sweeping, and have somewhat disturbing implications, in the sense that I think Congress and the public, as well as the press, have traditionally relied on some give-and-take between civil servants and others in the government who may disapprove of things that are being done at higher levels. For example, giving out information that enables the rest of us to have a look at what

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the government is doing, as part of the process of governance. And a proposal that says anytime the higher-ups decide to stamp "secret" on a document, it's a crime for anyone else to disclose it, I think, could change the nature of our society.

REHM: Mr. Carver?

CARVER: Well, Stewart has raised a number of important points, some of which I agree with, some of which I would interpret slightly differently.

I think that the government does have certain secrets that it has to protect in order to do what the Constitution said in its Preamble it was organized to do, which among other things is promote the general welfare and secure the blessings of liberty to ourselves and our posterity, and to provide for the common defense.

Now, Harry Truman, in typical salty directness, I think put his finger on the nub of the problem in an October '51 press conference when he said, "Whether it be treason or not, it does the U.S. just as much harm for its military secrets to be made known to potential enemies through open publication as it does for military secrets to be given to an enemy through the clandestine operation of spies." And this is a problem.

The problem is compounded by something with which all of you and most of your listeners are doubtless aware, but doesn't get very much discussed. Because of modern technology, because of the pervasiveness and near-instantaneous quality of communications, there is no way you can tell anything to, quote-unquote, the American people without simultaneously telling it to every interested government, intelligence service, general staff around the world.

And, therefore, the kinds of open debate on which we pride ourselves carry a cost. And this involves a kind of delicate trade-off of balances, and sometimes competing equities. And I think it's where and how you effect the trade-offs that the debate is most usefully focused, not on the absolutist position on either side: that the government can classify anything it wants to, which is the sort of purist position, governmentally; or the the absolutist civil libertarian position that the government is entitled to no secrets at all, save those which journalists feel that it might be allowed to keep.

REHM: Of course, there is a rather decided difference between endangering the country and embarrassing the government. I think of the recent case involving New York Times reporter Leslie Gelb, which involved the publication of material that apparently had already been published elsewhere. Mr. Gelb was

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excluded from seeing State Department officials as a result of that publication.

Are we talking about sensitivities, or are we talking about risks to the national security? Mr. Taylor?

TAYLOR: I think that's -- the Les Gelb example is a very good one, because Mr. Gelb had spoken with high-level State Department officials before he published his article and had something of an understanding with them that they would give him certain information, since he already knew what had been published abroad, and he would try to take care not to publish new secrets that had not already been published abroad. And I think he carried through on that.

The Secretary of State, George Shultz, following up on a stronger reaction by one of his subordinates, told Congress, in testimony, that serious damage to the United States had been done by Mr. Gelb's article. When he was asked how it was that he could say this when the same information had been previously published abroad, he said: well, in essence, the New York Times is a large, important news organization. What they say is taken more seriously.

Although he didn't quite specify it, I think it's fairly clear that what Mr. Shultz was disturbed about was not that foreign intelligence agencies or the Russians or the Libyans were learning something from the New York Times they didn't already know. What he was disturbed about was that the countries in which nuclear depth charges might be placed, under certain contingency plans, such as Iceland, that their populations might be roused into some level of political dissent by the widespread publication of such information -- i.e., this was a case of political inconvenience, not, I think, of a real military secret at that point.

And just to finish on that, I think there are a lot of examples like that. And I think, although again the press will try to avoid, generally speaking, publishing real military secrets, I think that we part company with the government's point of view when the government says, "You shouldn't publish things that cause us political inconvenience or embarrassment in formulating our military plans."

CARVER: Well, the Gelb case, or situation, takes us a little bit off track, but it takes us into a very important, I would consider important, area.

One of the great problems about the article that Leslie Gelb wrote, the fellow who took exception to what he said was his successor in the same State Department job that Gelb had once

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held. And I, frankly, regard it unconscienceable [sic] for a person to come out of the journalistic profession, take a government job of great sensitivity, and then go back as a journalist and write articles about his former duties. To me, I mean it is -- I know from having been in the government for 26 years -- you talk about chilling effect. It would be an extremely chilling effect, chilling to have to sit down around a table, discussing a very sensitive issue with a high-level counterpart in the State Department, knowing in the back of your mind that six months later he is going to be back in the New York Times and might not respect the sanctity of privacy of the discussions that you've been holding.

TAYLOR: I'd like to defend my colleague Mr. Gelb. I think Mr. Gelb has throughout his career been very careful not to disclose secrets to which he gained access while he was in the government. And this case of the nuclear depth charges was not a case of that. He was disclosing information he obtained after he left the government, as a reporter, just the way I would obtain it. And I've never worked for the government.

REHM: Mr. Taylor, I want to press you on a point that Mr. Carver just made. He said that this Gelb issue is off the mark, that it is somehow a little off the target of our conversation. From your perspective, is that the case?

TAYLOR: I don't think so. I think the fact that Mr. Gelb worked for the government at one point introduces an issue that is not usually present. And I disagree with Mr. Carver on how that issue should be resolved.

But, for example, when the Pentagon Papers were published by the New York Times and other newspapers in 1971, that was a classified study, Pentagon study of the Vietnam War, very voluminous. And the government, the Nixon Administration said, "This is all classified. It jeopardizes the national security. You shouldn't publish it." And when The Times went ahead and published it, they went to court to try and get the courts to enjoin publication, and were ultimately unsuccessful in the Supreme Court.

But the Pentagon Papers was a vast document. There were some, perhaps, legitimate secrets in it that the newspapers deliberately refrained from publishing. And I think that the government's lawyers were completely unsuccessful in pointing to anything that was published in the Pentagon Papers that really jeopardized national security.

REHM: Stewart Taylor. He is a legislative correspondent for the New York Times. Also here in the studio, George Carver of Georgetown Center for Strategic and International Studies....

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Mr. Carver, how did you feel about the CIA's recent proposal for secrets legislation?

CARVER: Well, I haven't seen the text of the actual proposal tabled. Mr. Taylor's sources and his access to leaks are better than mine, since I retired from the government.

TAYLOR: I doubt it, George.

CARVER: But I feel that there is a problem that needs addressed. Whether the particular approach embodied in that suggested legislation was the right approach, I don't know, as I say, having not seen it.

The situation the government is faced with now -- and I caution that I'm not a lawyer. Mr. Taylor is. So if you have legal questions, defer them to him. The government now, to protect itself, must use two statutes, as I said, Section 793 and 794, Title 18 of the U.S. Code, the so-called espionage statutes, which require willful or deliberate passage to a foreign power, with intent to harm the United States.

Now, that's a standard of proof almost impossible to sustain in a present court. And therefore there is almost nothing that bars the door, unless you get into a communications intelligence dimension, because that's covered by a separate portion of the U.S. Code, Section 798. And there, unauthorized disclosure alone is all that the government has to prove.

Now, I think that you need some tightening of present legislation. How much is something that can be debated. But I think that the thinness of the government's present arsenal for defending itself and the people who elected it to defend them does need strengthening. And I think that's where the debate should be focused upon.

REHM: As I understand it, the CIA proposal would have prosecuted government employees who leaked the information, but not the reporters who published it. Is that correct, Mr. Taylor?

TAYLOR: That's correct.

CARVER: It almost has to be that way, Diane. Because, you see, drafting legislation that takes action against those who publish the information in question gets you on very thin constitutional ice because of the First Amendment. So if you want to lock the barn door, you'd better lock it with the working draft horses inside the stable, rather than trying to lock the paddock fence.

TAYLOR: I must say, Mr. Carver, I would feel a little

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secure if the Justice Department interpreted the current legislation the same way you do. In the case you mentioned earlier, of the prosecution of Samuel Morison, the naval intelligence analyst who is accused of providing classified intelligence satellite photographs to a British military magazine, the Justice Department has taken the position that the same espionage laws Mr. Carver just discussed can be used to prosecute a government employee who releases information, any classified information, really, relating to the national defense, whether or not he intended to harm the country, regardless of what his motive was, and really almost regardless of whether there was any serious damage that could realistically be expected to follow from the publication. And so I think the interpretation of current law is in dispute in that case.

Just two other brief points.

First, I agree with Mr. Carver that it's not easy for the government to make criminal prosecutions of people the way the law is now for leaking intelligence secrets to the press. Howewver, that's not their only option. They can discipline people. They can fire people. Most government workers value their jobs and would not lightly put themselves in a position where they would lose their jobs, be held in disgrace, never get a positive reference to a future employer, and so forth.

If we're talking about spies, they're not going to worry about that. If we're talking about spies, you can use the espionage laws against them, even if they're narrowly interpreted.

And finally, I think that while it's possible to imagine a very carefully drafted law to try and get at people who maliciously, if you will, leak legitimate secrets, the Administration has not drafted one yet. The one that the CIA came up with would have provided for prosecution of virtually anyone who leaked virtually any document stamped classified, as long as some vague nexus could be established between that document and national defense policies.

REHM: And what's happened to that proposal?

TAYLOR: That proposal has been dropped by the Administration. It's not quite clear how hard the CIA was pushing it. It was originally forwarded to the Office of Management and Budget under the signature of William Casey, the CIA Director. And eventually various agencies, including the Justice Department, the White House, got together and talked about it, and they ended up deciding to drop it.

The apparent reason they dropped it was that they didn't

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think that this was the right time or that the CIA authorization legislation, to which it was attached, was the right vehicle to raise such a serious issue.

REHM: I want to pick up on one thing first, Mr. Carver, and that is the fact that you, Mr. Taylor, did have access to that document, which I gather there was some reluctance to give out, not only to you, but to others.

TAYLOR: Yes. I obtained that document through channels that ultimately involved a government employee or employees. It was not a classified document, in the sense of being a document that is stamped "Secret. This involves national security. Don't publish it."

The Administration did not want it published at the time because it was an internal memorandum that they were not yet prepared to send out to the public. I think it's legitimate for them to try and keep that sort of thing to themselves, if they can. And I think it's legitimate for the press to try and bring it to the public's attention, if we can.

CARVER: Well, again I remind you, Mr. Taylor had access to the document. I didn't. But let's go back on a couple of things before people call.

First, talking about Morison, let's understand what it was that Morison did. Morison stole off of a colleague's desk some highly sensitive satellite intelligence photographs, which he then sent to a British publication. Now, if I stole off of your desk some of your private correspondence that you did not want out, and sent it to the New York Times, which then published it, I would like to think that you had legal recourse against me, because I would feel that I had done something that was unconscienceable.

Now, I believe that holding Mr. Morison up as a great civil libertarian champion and arguing that this is a civil liberties case is a little bit wide of the mark, considering the facts involved. I think the government should probably not have prosecuted him under the espionage statute. They should probably have prosecuted him for theft.

TAYLOR: They did. Both.

CARVER: Also, I think that we have touched on, in some of our discussion, probably a much more useful avenue for the government to follow than the path of legislation. I happen to be skittish about the merits of legislation because courts tend to interpret things in ways that the drafters never thought about.

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I think that a great deal could be done with using the concept that lies behind the CIA's secrecy agreement. And people who have access to classified, legitimately classified information -- and I remind you that it is really the function of those who are elected and have to face the voters, and then the subordinates whom they select at the top level, with the advice and consent of the Senate, who really are empowered to make the judgment calls about what is a secret and what is not, rather than those who set themselves up with a typewriter or a microphone.

But I think that pushing the notion of a secrecy agreement and setting up, basically, a contractual situation --there was a CIA officer named Frank Snepp, for example, who published a book, and he was prosecuted, convicted, and it was sustained by the Supreme Court. And the grounds on which the Supreme Court sustained Snepp's conviction was that the secrecy agreement was a contractual obligation, and he was in breach of contract.

I think that is a much better avenue to -- better kind of took or technique to use and a much better avenue to explore than sweeping legislation.

REHM: Of course, there is that other question of when and how you decide whether a whistle-blower has actually done a service to the country, or has endangered that country's security. And who is going to make those decisions?

TAYLOR: I'd like to respond briefly on the Morison case, because I don't think anyone is seriously arguing that Mr. Morison is a great civil libertarian. I should say that Mr. Morison...

CARVER: Well, probably Tony Lewis is.

TAYLOR: I should say that Mr. Morison and his attorneys have not -- he's pleaded innocent and he has not conceded that he did the things the prosecution has said he did. So that issue is still open.

But assuming that the prosecution can establish that, and they have some evidence, I think that their position is that Mr. Morison, in sending these photographs to the British military magazine, did it for purposes of career advancement, that he was not a whistle-blower.

However, I think there's an old adage that hard cases make bad law. And there are a couple of things about the Morison case that I think are troublesome.

First, the types of photographs that he sent to the

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British military magazine have been published openly by the Pentagon time and time again as part of its annual booklet, of various publicity efforts the Pentagon makes to show what kind of airfields are being built in Nicaragua or Grenada or Cuba, or things like that. And therefore I think it remains to be seen whether the government can prove that there was anything that the Russians would learn from a publication of those photographs they didn't know already.

CARVER: Well now, I've got to pick you up on that one right there.

REHM: Very briefly Mr. Carver, because I do want to open the phones.

CARVER: Among the most legitimate secrets that the government has are the capacities of its satellite cameras. And without going into details that shouldn't be discussed in the open air, the government is very careful that those satellite photos which are published are adjusted, as it were, so that the publication of them will mask the full range of capabilities of the cameras that acquired them.

The photographs that Mr. Morison took off of his colleague's desk had not been so adjusted. And therefore, even though they show the same kinds of things that appeared in Defense Department publications, the question about whether or not they did damage is a much more complicated technical question than many people who discuss it in the lay press would apparently realize.

REHM: Let's open the phones.

WOMAN: I'd like to speak to your readers about a point that has always bothered me. I lived abroad for a long time and I've read a lot of foreign newspapers. And you'll see a lot of information in foreign newspapers that are very reputable, like, for example, the [unintelligible] Zeitung, Le Monde, where what would be classified information over here is in the public domain in other countries because their newspaper reporters have found out all these things and have written them.

And for example, I'd just go back to some things like CIA participation in the Hungarian revolution in 1966 [sic], and things like the overthrow of the Iranian government before they put in the Shah, and CIA participation in Pakistan.

REHM: Okay. So your point?

WOMAN: Well, the point I want to make is this: When a piece of information that would be classified here -- for

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example, pertaining to Central America or something like that --can you prosecuted if you're a government employee for saying something about that when it's already in the public domain in another country?

TAYLOR: I think the Justice Department's position is that you can. However, the courts -- it remains to be seen whether the courts will adopt that interpretation of the law. It's not at all clear what the law is now. And that's one of the problems in the Morison case. Civil libertarians are concerned that, regardless of whether Mr. Morison is a good guy or not, that case could create a precedent that could be used against legitimate whistle-blowers exposing policy differences or wrongdoing.

WOMAN: I'd like to ask you one more question.

REHM: Very briefly, please.

WOMAN: When the CIA or some government agency is sponsoring publications like Encounter, or something like that, you know, paying to set up a publicity effort or something like that, and that's exposed, is that a prosecutable thing? I mean, for example...

REHM: All right. Thanks for calling.

Mr. Carver.

CARVER: Short answer, no. And the CIA has not engaged in that kind of activity since the great flap about precisely such things as Encounter that occurred in the mid-1960s.

And this, again, raises another problem. It is impossible for the U.S. Government to lend a quiet hand to its friends overseas and protect their secrets and the fact of their cooperation, it makes it extraordinarily difficult to get people that you need to cooperate to help you, to continue to do so, because they're not going to put their lives and their careers hostage to your loose lips.

REHM: I wonder whether this whole question gets to the classification process itself and whether it has become too broad and whether that's how we need to approach this question -- that is, using classification more deliberately and more carefully.

TAYLOR: I think that is one of the problems. And I think it's acknowledged as a problem by people on all sides of this issue.

Edwin Meese, the Attorney General, very recently said

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that he thought the classification stamp was applied far too liberally. Supreme Court Justice Potter Stewart said in the Pentagon Papers case that when everything is classified, nothing is classified. What he meant by that is when bureaucrats abuse the classification system by stamping "secret" all sorts of things that shouldn't be secret, respect for the whole process degenerates.

Now, notwithstanding Mr. Meese's statements, the one concrete step that this Adminstration has taken to change the classification system is, in various ways, to make it easier, rather than harder, for govrnment officials, thousands of them, to stamp documents "secret."

CARVER: But, Diane, you get into two problem areas there. In the first place, classifying something is always a judgment call. On any judgment call, other people can argue it. But basically, those calls, I believe, have to be made by the people who are responsible for making them and accountable within the government for making them. And you can't set yourself up as an external arbiter deciding whether or not those calls were properly made if you're going to have classification at all.

Secondly, you've got to understand that some things that may not seem to be classifiable in fact are very legitimately classifiable.

No one think, for example, that a joke could possibly be classified. But if a particular joke happened to have been told by an irreplaceable source in a very small meeting in the Soviet Union and it gets on the cocktail circuit and the source gets shot, you've got a serious problem.

REHM: So where do you think this issue is going? Very briefly.

CARVER: Well, I think it's going into the swamps of discussion, unfortunately. But I'd like to see a clearer focus on both sides, a recognition that there is a problem, and a joint effort on the part of people outside and inside the government to solve the problem, rather than taking absolutist positions on either side of the case.

REHM: What do you think, Mr. Taylor?

TAYLOR: Very generally, I agree. I think the ultimate issue is that how do you run an open society without giving away all your secrets for free. One option would be to close the society, to become more like the Russians in order to protect ourselves from them. I don't think anyone wants to go too far down that road. The hard question is how far.

REHM: ...Thank you, both, so much.

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